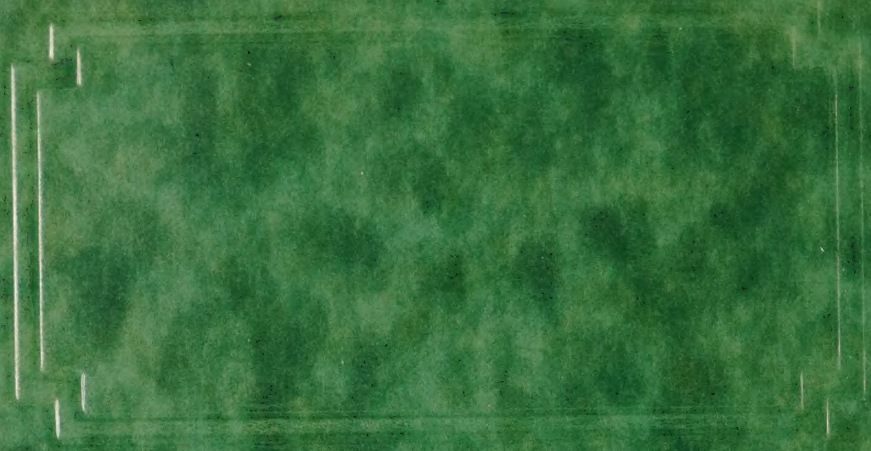
Charter of rights and Canadian Labour Law



Backgrounder

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THE CHARTER OF RIGHTS AND CANADIAN LABOUR LAW

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THE CHARTER OF RIGHTS AND CANADIAN LABOUR LAW

INTRODUCTION

In the almost seven years since it came into force,(1) the Canadian Charter of Rights and Freedoms has, as anticipated, had an effect on the development of Canadian law that has been so far-reaching that few areas of the laws of Canada and her provinces have been untouched. Although the Charter has for the most part not had a radical effect on labour law -- most Charter litigation in the area has left the status quo intact -- the judgments rendered in labour cases are important in defining the shape that certain Charter rights and freedoms will take, both in the regulation of employer-employee relations and in other fields of law.

Employer-employee relations, by their very nature, are at times adversarial. Collective bargaining involves a struggle between the bargaining parties as to the share of each in the benefits of production. During the life of a collective agreement, conflict may arise over its interpretation and the administration of such matters as discipline, the right to overtime and the duties of an employee. The process of unionization itself is likewise the subject of deeply-held divergent views and interests. An employer may resist the advent of union representation in the workplace and may attempt to persuade employees of its potential disadvantages. Individual employees, too, out of conviction or simply because they perceive a union may bring limited advantage or possible disruption, may react negatively to a union's bid to represent them, or may wish not to associate themselves with the union if its bid is successful.

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(1) The Charter was proclaimed in force on 17 April 1982 except for section 15, the equality rights section, which came into force on 17 April 1985.

Not surprisingly, then, labour relations laws are replete with provisions, some mandatory, others permissive, which condone the creation of non-consensual relationships among the various entities and individuals affected by a collective bargaining regime. Some of these relationships may well give rise to legal challenges based on alleged infringements of the rights and freedoms guaranteed by the Charter. Moreover, government itself, either as employer or as third party may intrude in labour disputes to end (or prevent) work stoppages and to provide mechanisms for the binding settlement of the conditions of employment which will prohibit recourse to the ultimate weapons of strike or lockout. Such actions by government have been and will continue to be challenged under the Charter.

APPLICATION OF THE CHARTER

Section 32 of the Charter provides as follows:

> This Charter applies
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> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Speaking for the Supreme Court of Canada in its decision in Retail, Wholesale and Department Store Union, Local 580 et al. v. Dolphin Delivery Limited,(2) Mr. Justice McIntyre concluded that the Charter did not apply to purely private disputes in the absence of legislative or governmental action. The case concerned the use of secondary picketing against a firm which the trade union in question alleged was colluding with another employer, the object of a strike, to avoid the consequences of the labour dispute. In so concluding, McIntyre J. adopted the reasoning of

(2) 33 D.L.R. (4th) 174.

other courts and of commentators as articulated by Professor Katherine Swinton, who wrote:

> The automatic response to a suggestion that the Charter can apply to private activity, without connection to government, will be that a Charter of Rights is designed to bind governments, not private actors. That is the nature of a constitutional document; to establish the scope of government authority and to set out the terms of the relationship between the citizen and the state and those between the organs of government. The purpose of a Charter of Rights is to regulate the relationship of an individual with the government by invalidating laws and governmental activity which infringe the rights guaranteed by the document, while relations between individuals are left to the regulation of human rights codes, other statutes, and common law remedies, such as libel and slander laws. Furthermore, s. 32(1) specifically states that the Charter applies to "the Parliament and government of Canada in respect of all matters within the authority of Parliament" (emphasis added). It is governmental action which is caught, not private action.(3)

A further refinement of this view must take into account the extent to which the courts will find the element of legislative or government action necessary for the application of Charter provisions. For example, in the 1986 case of Re Lavigne and Ontario Public Service Employees Union,(4) a community college teacher complained that union dues collected from him pursuant to a mandatory term of the collective agreement were being spent, in part, on the promotion of political and other issues and that certain of his Charter freedoms were thereby infringed. The Ontario High Court of Justice had to consider the question of the Charter's applicability to the dispute. It found that the collective agreement in question had been negotiated on behalf of all community colleges in Ontario by the Council of Regents for Colleges of

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(3) "Application of the Canadian Charter of Rights and Freedoms" by Katherine Swinton in Canadian Charter of Rights and Freedoms: Commentary, Walter Tarnopolsky and Gérald Beaudoin, editors, Carswell Company, Toronto, 1982, p. 44.

(4) D.L.R. (4th) 321.

Applied Arts and Technology, a provincial body which acted as an agent of the Crown. The necessary governmental action was thus present.

On the other hand, the courts have consistently accepted the argument that a legislature's adoption of legislation merely permitting private parties to negotiate such mandatory collective agreement provisions, but not requiring their inclusion in an agreement, does not constitute "legislative action" for the purposes of invoking the Charter.

SELECTED LABOUR RELATIONS ISSUES AND THE CHARTER

Charter challenges may be made to various technical or procedural aspects of union certification, negotiation of an agreement, or interpretation or application of an agreement's provisions. The emphasis of this paper will be on those matters which have broad ramifications upon labour relations and thus on society as a whole.

Perhaps the most important question is what, if anything, does the Charter guarantee to employees who wish to band together to establish the conditions in which they perform their employment. The Supreme Court of Canada has rendered decisions in three cases, sometimes called the "labour trilogy," which appear to have conclusively settled some of the basic issues. Although not decided in accordance with identical judicial views, the three decisions are generally conceded to have established limits on the freedoms and rights which trade unions will be able to assert on the basis of the Charter.

In Reference re Public Service Employees Act,(5) the Alberta statute which was the subject of litigation prohibited employees to whom it applied (generally, provincial public servants in Alberta) from striking. Likewise, it prohibited their employers, the Government of Alberta and various public agencies and services, from resorting to lockouts. Disputes as to the contents of a collective agreement were to be referred to compulsory arbitration. The question which formed the basis of the reference was whether the prohibition of strikes and the use of

(5) 38 D.L.R. (4th) 161.

compulsory arbitration interfered with the Charter guarantee of freedom of association.

Mr. Justice McIntyre, who was in agreement with the majority of the Court, recognized the value of freedom of association, a freedom secured by section 2(d) of the Charter; in his words, "at its core rests a rather simple proposition: the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others." In assessing the constitutional position of this freedom, McIntyre J. made the crucial argument that it was "a freedom belonging to the individual and not to the group formed through its exercise."(6) In his view, then, a group could exercise only the constitutional rights which adhered to its individual members as individuals. In other words, the act of association did not create new rights which were unknown to individuals or remove limits on existing individual rights simply because those rights were sought to be asserted on behalf of a group rather than an individual.

Justice McIntyre's opinion presents a range of interpretations which may be placed on freedom of association, from the very restrictive to the virtually unlimited. The most restrictive of the possibilities would hold that freedom of association is limited to a right to associate with others in common pursuits or for certain purposes but that no protection adheres to the objects or purposes of the group, even if a particular object or purpose might be constitutionally protected with respect to individuals. The widest interpretation would extend constitutional protection to all acts done in association, subject only to the reasonable limitations which may be imposed under section 1 of the Charter. Rejecting both ends of the spectrum, McIntyre J. embraced the notion set out above that the mere act of associating does not confer on the group rights that its members do not possess as individuals but neither does it deny rights possessed by individuals simply because they are exercised by a group. There being no constitutionally protected right to strike for individuals,

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(6) Ibid., at page 12152.

it follows, in McIntyre J.'s reasoning, that there is no strike right which may be exercised by a group claiming Charter protection.

The Alberta public service reference gave rise to a strong dissent from the Chief Justice and Madam Justice Wilson. The dissenting opinion is based heavily on Canadian and American jurisprudence as well as on international human rights conventions to which Canada is a party. It encourages the examination and definition of Charter rights by reference to the historical and current value of the activity sought to be protected. Further, it rejects what it terms the majority's "constitutive" approach. If a right is only constitutionally shielded if it adheres to individuals as well as groups, then freedom of association means little as an independent, explicit constitutional guarantee. Indeed, some activities, and among these the Chief Justice included collective bargaining and strikes, are virtually meaningless when spoken of in the context of individual rights. For freedom of association to acquire meaning, a more liberal approach is necessary than one which simply views it as an associational adjunct to individual rights.

Two other decisions, however, released concurrently, reinforce the virtual certainty that Canadian courts will not view section 2(d) of the Charter as extending protection to the activities of trade unions in collective bargaining and work stoppages. In Public Service Alliance of Canada v. The Queen,(7) the federal government's legislation temporarily suspending the collective bargaining rights of federal public servants was upheld. In this case, Chief Justice Dickson, while retaining the view that freedom of association extends constitutional protection to bargaining activities, opined that the legislation, being temporary and anti-inflationary in intent, was a justified limitation on the Charter right. Similarly, back-to-work legislation ending a work stoppage in the Saskatchewan dairy industry was upheld, the Chief Justice again accepting the legislation as a constitutionally valid reasonable limitation.(8)

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(7) 38 D.L.R. (4th) 249.

(8) Retail Wholesale and Department Store Union, Local 544 et al. v. Government of Saskatchewan, 38 D.L.R. (4th) 277.

Other principles mentioned above bear closer examination. The applicability of the Charter is the most important of these. As we have seen, absent legislative or governmental action, that is, where private parties only are involved, the courts have not applied the provisions of the Charter to labour disputes. This is not to say that the Charter has no relevance whatsoever to private matters. As the Supreme Court of Canada made clear in Dolphin Delivery, where a private act is dependent for its validity on a legislative or government action which is itself invalid under the Charter, there will be obvious, albeit indirect, Charter repercussions on the private act. However, merely permissive provisions in a statute are insufficient to justify the invocation of the Charter. This was the view taken by the British Columbia Court of Appeal in Re Bhindi and British Columbia Projectionists.(9) In that case, the court was confronted with a collective agreement which contained a "closed-shop" clause which prohibited the employment of non-union members. The relevant legislation, The British Columbia Labour Code,(10) did not require the inclusion of such a clause; it merely permitted it. At common law, a closed-shop agreement would have been illegal. Notwithstanding this, a majority of the Court of Appeal held that the enactment of a permissive provision was insufficient to support a Charter challenge. It was the "closed-shop" condition of the collective agreement, not the provision of the Code, which potentially interfered with freedom of association. The "closed-shop" did not follow automatically from the Code; thus there was not the legislative or governmental action which could have been the basis of a Charter challenge. An appeal to the Supreme Court of Canada was dismissed.

Cases raising similar Charter issues have dealt with the monopoly on representation enjoyed by a trade union certified to bargain for a given unit of employees. All employees in the bargaining unit are bound by the collective agreement, whether or not they are members of the union and whether or not they voted in favour of its certification.

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(9) 29 D.L.R. (4th) 47.

(10) R.S.B.C. 1979 c. 212.

Moreover, individual contracts of employment are prohibited; in other words, the collective agreement is not a minimum from which an individual employee can "bargain up" for, for example, a higher pay rate or richer benefits than those provided by the agreement. Thus far, the representative monopoly enjoyed by trade unions has not been the subject of a Supreme Court of Canada decision on the basis of the Charter. But in a 1963 judgment in a case challenging British Columbia legislation which prohibited the use of compulsory union dues for political activity, the Supreme Court referred to the monopoly status as a limit on the civil rights of the minority who did not wish to participate in the union but were nonetheless bound by the agreement.(11) Some two decades before the advent of the Charter, then, the highest court had articulated a notion of freedom of association and the limits placed upon it by the legal framework of collective bargaining. Although one cannot say as yet precisely how the judiciary will resolve this issue, lower court decisions have simply concluded that monopoly representation does not represent an interference with freedom of association or at least that it is within the reasonable limits of such freedom permitted by section 1 of the Charter. It seems highly probable, given that monopoly representation is integral to the maintenance of a coherent structure of collective bargaining as it has developed in Canada, that this view will prevail.

We have seen how certain aspects of the tripartite relationship of employee, union and employer established under Canadian labour law may give rise to Charter-based challenges. Perhaps one of the most sensitive of these is the use by trade unions of moneys, collected in the form of compulsory dues, for purposes nor strictly related to collective bargaining. This issue arouses considerable strong feeling. On the one hand, union activists assert that the goals sought for union members must be pursued in a socio-economic context broader than the relationship with the employer established by collective bargaining. Thus, the trade unions should be free to contribute money, labour or other goods and services to political parties, to promote various social, political or economic causes

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(11) Oil, Chemical and Atomic Workers International Union, Local 16-601 v. Imperial Oil Ltd., 41 D.L.R. (2nd) 1.

and so on. Those with a contrary view argue that individual employees who may not share the position of the union on the various issues confronting society should not be conscripted into supporting the union's activities, even if that conscription is limited to the use of a portion of their dues.

In the case of Re Baldwin and British Columbia Government Employees Union,(12) the Supreme Court of that province was confronted with a challenge to the right of the union to spend dues income as it saw fit. The legislative action necessary to the invocation of the Charter was present as the legislation pursuant to which collective bargaining took place provided for the compulsory payment of dues. Yet the court decided against the challenge. The decision shows how the results of a challenge may depend on the manner in which is is framed. The Court's decision turned on the fact that the legislative action pertained only to the collection of the dues, while what was being challenged was their use. In the words of the Court:

> There is no link between the governmental compulsion of payment of dues and the union's use of these moneys. Once the government has collected the dues and turned them over to the union, the government involvement is at an end. To hold that the term "government action" is applicable to activities that are facilitated or arise out of government intervention would make s. 32(1) meaningless since both the federal and provincial governments regularly redistribute and reallocate income among the population. Governments provide grants to private organizations and to corporations whose activities and expenditures they do not control or influence. In my view, the mere making of those funds available, without direction of any kind as to use, is not the sort of act involving governmental action to which s. 32 of the Charter is applicable.(13)

In Re Lavigne and Ontario Public Service Employees Union et al., the Ontario Supreme Court was able to reach a contrary conclusion. The requisite governmental action was found, since the agreement stipulated compulsory dues by a Crown agent acting on behalf of the employer

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(12) 28 D.L.R. (4th) 301.

(13) Ibid., pp. 308-309.

colleges. The Court found that the compelled payment of dues itself represented an interference with freedom of association. The use of the dues so collected was relevant to the question of whether that interference could be upheld as a reasonable limitation. The Court concluded that it could not. Balancing the right of the individual to refrain from association with causes or views to which he did not subscribe, and what the Court acknowledged were "legitimate and appropriate functions for a trade union," the judgment stated as follows:

> The Charter of Rights exists for the protection of minorities. With this view, I am prepared to conclude that the impact on the individual in this case, although it may be small in pecuniary amount, is serious enough that it requires that the government be required to accomplish its objective by using the least obtrusive method available. The principle which I think must be established, then, is that compulsory dues may only be used for the purpose which justifies their imposition and for no other purpose beyond that. In other words, the use of compulsory dues for purposes other than collective bargaining and collective agreement administration cannot be justified in a free and democratic society, where the individual objects to such use.(14)

On 30 January 1989, in a unanimous judgment,(15) three judges of the Ontario Court of Appeal overturned the trial court. The appellate court in effect adopted the reasoning of the British Columbia Supreme Court that the governmental involvement extended only as far as the collection and remittance of dues, not to their expenditure. The Charter was thus not applicable. The Court went further to hold that even if the Charter were applicable, the union's various uses of dues income would not infringe the Charter guarantee of freedom of association. In the words of the judgment:

> The employee remains patently free to oppose the union and the causes which it may support, to seek to have the union's bargaining rights terminated and to join

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(14) 29 D.L.R. (4th) at pp. 328-329.

(15) Lavigne v. Ontario Public Service Employees et al., Ontario Court of Appeal, unreported.

> with others for such purposes .... He is not forced to join the union; he is not forced to participate in its activities; and he is not forced to join with others to achieve its aims. The compelled payment does not identify him personally with any of the political, social or ideological objectives which OPSEU may support financially or otherwise; nor does it impose any obligation on him to adopt or conform to the views advocated by the union.

Use of compulsory union dues is an issue which is not conclusively settled and has greater importance than might appear to be the case at first glance. Several jurisdictions, including the two largest provinces in Canada, have enacted the "Rand formula," under which an employee in a bargaining unit may elect to remain a non-member of the union but must nonetheless pay dues to the union, as part of their labour relations legislation of general application. Thus, even though government is not involved as the employer, the terms of the legislation itself will provide the necessary underpinning for a Charter challenge.

Other aspects of the collective bargaining structure which has evolved in Canada may be the subject of litigation based on the fundamental rights enshrined in the Charter. Collective bargaining is based in statute law and is thus vulnerable to claims that constitutional rights are violated by the procedures and practices inherent in the system. Employers are restricted in the communication they may make to their employees who are engaged in a union organizing drive, for example. Will this give rise to a claim that the employer's right of freedom of expression is infringed unreasonably? Section 7 of the Charter guarantees the right to life, liberty and security of the person and the right not to be deprived thereof; an argument has been made that reverse onus provisions applicable to unfair labour practices violate this guarantee. Such provisions stipulate, for example, that where an employee has been dismissed allegedly because of involvement in union activities, it is incumbent upon the employer to refute the allegation rather than upon the union or the employee to prove it.

As the courts are moved to consider Canadian labour relations law and policy in light of the Charter, it is likely that even

where Charter violations are found, most of the impugned labour provisions will be saved by application of the "reasonable limits" test provided for by section 1 of the Charter. At this point it can be said that the Charter rights and freedoms are being principally applied to questions involving the relationship of the individual to the group, and not, as some had hoped and anticipated, to the entrenching in the Constitution the rights of trade unions.